CARLSBERG BREWERY (M) BHD

v.

SOON HENG AW & SONS SDN. BHD. & ORS.

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[CIVIL SUIT NO. 23-69-86]
30 JUNE 1988

CIVIL PROCEDURE: *Application for summary judgment - Appeal against Senior Assistant Registrar's decision granting leave to defend as to part of the claim - Whether triable issues raised.*

CONTRACT: *Interpretation of Guarantee - Whether guarantors guaranteed debt incurred before signing of guarantee - Question of knowledge and intention of the parties at time of execution of guarantee.*

The plaintiff sued the first and second defendant in the sum of RM458,749.84 and RM193,064.77 respectively and claimed against the third to sixth defendants up to a maximum of RM200,000 by virtue of a Guarantee dated 1 March 1984 which they jointly and severally signed as guarantors.

The Senior Assistant Registrar allowed final judgment against the first and second defendants in the sum as claimed pursuant to O. 14 of the Rules of the High Court. In respect of the third to sixth defendants the Senior Assistant Registrar allowed judgment for the sum of RM26,811.27 being the sum incurred by the first and second defendants after the execution of the Guarantee and allowed unconditional leave to defend in respect of the balance sum.

The plaintiff appealed against that part of the Senior Assistant Registrar's decision in which unconditional leave to defend was granted.

Held:

On a question of the construction of the Guarantee executed by the third to sixth defendants; it was clear that the guarantors had knowledge of the arrangement regarding credit facilities extended to the first and second defendants though the amount was not determined. As such it was within the contemplation of the parties that the guarantors are to be saddled with the liabilities incurred not only after but also before the signing of the Guarantee.

[Appeal allowed with costs.]

Cases referred to:

Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168
Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd. [1977] 1 MLJ 241

Legislation referred to:

Contracts Act 1950, s. 2(d)
Rules of the High Court 1980, O. 14

JUDGMENT

Idris Yusoff J:

The plaintiff in this suit filed an action against the first and second defendants claiming the sum of RM458,749.84 and RM193,064.77 respectively being the balance of the price of goods sold and delivered to them. The claim against the third - sixth defendants as guarantors by

virtue of they being the signatories to the guarantee dated 1 March 1984 in which they undertook *inter-alia* to jointly and severally pay the plaintiff all monies due from the first and second defendants up to a maximum sum of RM200,000.

By a summons-in-chambers the plaintiff applied to sign final judgment pursuant to O. 14 rules of the High Court.

a) against the first defendant for the sum of RM458,749.84 together with interest at the rate of 8% from the date of filing to the date of realisation;

b) against the third, fourth, fifth and sixth defendants jointly and severally for the sum of RM200,000 together with interest at the rate of 8% from the date of filing to the date of realisation; and

c) costs.

The summons came before the Senior Assistant Registrar who after hearing submissions from both sides allowed final judgment for the sum of RM458,749.84 to be entered against the first defendant with interest as prayed for but as against third, fourth, fifth and sixth defendants for the sum of RM26,811.27 only and an unconditional leave was given to the said defendants to defend the claim for the balance sum. Costs were also awarded to the plaintiff.

The appeal by the plaintiff is in respect of that part of judgment in which the Senior Assistant Registrar gave unconditional leave to defend.

In coming to that decision the Senior Assistant Registrar was satisfied that the third - sixth defendants had raised the following triable issues and I quote:

i) whether they were liable for the sum owed by the first defendant before they became the guarantors.

ii) what were their intention when they signed the guarantee.

It is however common ground that after signing the guarantee the first defendant incurred a debt of RM26,811.27 only.

Before me Counsel for the plaintiff submits that the matter revolves around the question of interpretation of the instrument of guarantee. He refers firstly to the recital which indicates that the guarantors i.e., third to sixth defendants are aware of the existence of the purchase agreement between the plaintiff on the one part and the first and second defendants on the other which agreement confers credit facilities under the normal credit period on the first and second defendants. It is submitted that in view of this agreement the guarantors would have been aware at the time of signing the guarantee that the first and second defendants must have debit balances in their accounts with the plaintiff. In terms of element of consideration Counsel refers to cl. 2 of the guarantee which says -

> ... and in consideration of CBMB (plaintiff) having at the request of the guarantors agreed to provide such credit facilities to the borrower the guarantors hereby jointly ...

and this clause constitutes consideration within the ambit of s. 2(d) of the Contracts Act 1950. He goes further to say that the combined effect of clauses 1 and 2 of the guarantee connotes that the guarantors have agreed to jointly and severally undertake to guarantee as principal debtors and not merely as sureties to repay the plaintiff whatever credit facilities that have been extended to the first and second defendants but to a maximum of RM200,000 by virtue of Clause 3 and the facilities include those extended prior to the signing of the

guarantee. Since both parties agree that the crux of the matter involves solely the question of construction of the guarantee and no further factual evidence is required, Counsel submits that following the judgment of Raja Azlan Shah, J (as he then was) in *Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd. [1972] 1 MLJ 168* which says -

> ... If one simply has a short matter of construction with a few documents, the Court on summary application should decide what in its judgment is the true construction, There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed,

the Court should grant the application for summary judgment under O. 14 if it places a construction in favour of the plaintiff.

Mr. Lim Hong Sang for the defendants however argues that the recital does not state the outstanding amount of the debt and reliance is placed on the case of *Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd.* [1977] 1 MLJ 241 as an authority that the guarantor would only be liable for debts or liabilities incurred after the date of the guarantee.

The term "guarantee" means an accessory contract whereby one party (the guarantor or surety) undertakes to be answerable for the debt, default or miscarriage of another (principal debtor) who is primarily liable to a third party (the creditor). It is thus a contingent liability but there have been cases whereby the liability of the guarantor had been made primary and co-extensive with the principal debtor, depending upon the intention of the parties which is to be collected from the language and the words of the guarantee. It is immaterial, in the legal construction of the guarantee, that the party signing it knew nothing of the circumstances or the dealings between the debtor and the creditor, because generally a person signing such an instrument must be taken to have intended that which the words themselves naturally import, with reference to the circumstances that exist, whether he has taken care to make himself acquainted with the circumstances or not.

In the case under appeal it is the document of the guarantee and this document alone which is the foundation of the claim by the plaintiff and in the circumstances it seems that the rights and liabilities of the parties depend upon the true construction of the guarantee and indeed this view is not disputed by either side.

Reading the recital of the guarantee it is clear that the guarantors had knowledge of the arrangement regarding credit facilities extended to the first and second defendants though the amount was not ascertained. In that event I do not think that the guarantors can be allowed to controvert this statement since the statement appears to have generally been agreed upon by all the parties. In reference to Clause 1 the term "the said monies" plays a very significant role in construing the guarantee. In the context it means a sum as recorded in the books of CBMB (Calsberg Brewery Malaysia Bhd.) as representing the credit given to first and second defendants for goods supplied by the plaintiff and it is in respect of "the said monies" that the guarantors agree to guarantee repayment upon the terms and conditions appearing in the guarantee. As Clause 1 stands it imposes an obligation on the guarantors to make good all sums constituting "the said monies", however their liabilities are restricted by Clause 3 which imposes a maximum limit of RM200,000. The "said monies", as at the date of filing the claim, at least stood at RM458,749.84 being the final judgment awarded against the first defendant by the Senior Assistant Registrar and there is no appeal against the said order.

Adverting to the defendants' contention, it appears to me at least *prima facie* that such contention bears some merits but the underlying principle therein is not without any exception for, as I have said earlier, the extent of the guarantors liabilities will normally be spelt out in the guarantee in clear and unambiguous terms so that the intention of the parties can be gathered therefrom.

Chew Soon Tat's case relied upon by defendant to my mind cannot be taken as a proposition that the guarantor is only liable for debt or liabilities incurred after the date of the guarantee. The decision in that case was arrived at based on the facts as presented therein and also having regard to the loosely worded letter of guarantee. The Court found that "there was no expression of intention nor can we be justified in holding that the appellant accepted and/or undertook liabilities prior to 3 April 1972." i.e., the date of the letter of guarantee. On the strength of the guarantee the Court was not in favour to make the guarantor liable to contribute towards repayment of liabilities incurred before 3 April 1972 "in the absence of express acceptance or undertaking of liability therefor". The decision implies that the guarantor can be made liable for any antecedent debt if the guarantee so expressed.

On going through the guarantee in this present appeal I am of the view that it is within the contemplation of the parties that the guarantors are to be saddled with the liabilities incurred not only after but also before the signing of the guarantee. This is the plain meaning of the words used, and an appreciation of this plain meaning inevitably destroys the contention of the guarantors advanced in this appeal.

In consequence thereof I allow the appeal and make an order in terms of the prayer as in para. 1 (a)(ii) of the summons-in-chambers. Costs to the plaintiff.

Also found at [1988] 2 CLJ 754